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No. 84-1470

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

CLARENCE FRANCOIS,
Petitioner,

VS.

RAYBESTOS-MANHATTAN, INC., et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT ARMSTRONG WORLD INDUSTRIES, INC. IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review the decision of the Ninth Circuit Court of Appeals which denied admiralty jurisdiction to a shipyard worker alleging asbestos exposure.

PARTIES TO THE PROCEEDING

Plaintiff and Petitioner: Clarence Francois and

Defendants and Respondents: Armstrong World Industries, Inc.; U.S. Gypsum Co.; The Flintkote Co.; Fibreboard Corp.; Keene Corp.; Keene Building Products Corp.; Owens-Corning Fibreglas Corp.; Nicolet, Inc.; Celotex Corp.; PPG Industries; ACandS, Inc.; Standard Insulations, Inc.; and Eagle-Picher Industries, Inc., filed and/or joined in Motions to Dismiss in the District Court below.

Other defendants named by plaintiff are listed in the caption of the First Amended Complaint, attached hereto as an appendix. App. 1-3.

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Supreme Court, Rule 17 3

No. 84-1470

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BRIEF FOR RESPONDENT ARMSTRONG WORLD INDUSTRIES, INC. IN OPPOSITION

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals (App. 23-24) is unreported. The opinion of the District Court for the Northern District of California (App. 13-21) is reported at 577 F.Supp. 439 (N.D. Cal. 1983).

JURISDICTIONAL GROUNDS

The judgment of the Court of Appeals was entered on November 13, 1984. App. 23. The Petition For A Writ Of Certiorari was filed on March 12, 1985. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The relevant statutory provision is reproduced at Pet. 3-4.

STATEMENT OF THE CASE

This action was brought in the United States District Court for the Northern District of California, predicated upon admiralty jurisdiction as set forth in 28 U.S.C. § 1333. In his First Amended Complaint, Petitioner alleged "he worked in the repair of completed vessels involved in the service of water-based commerce and that his handling of and/or exposure to asbestos products referred to herein arose during such activity". App. 3.

Respondent Armstrong World Industries, Inc., herein moved to dismiss Petitioner's action for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted on the ground admiralty jurisdiction did not lie.

The United States District Court granted Respondent's motion and ordered dismissal of Petitioner's entire action for lack of subject matter jurisdiction on the sole ground that admiralty jurisdiction did not lie.

Petitioner appealed from the judgment of the United States District Court. The United States Court of Appeals For The Ninth Circuit affirmed the judgment of dismissal for lack of subject matter jurisdiction on grounds the activities of Petitioner did not bear sufficient relationship to traditional maritime activities and admiralty jurisdiction therefore did not lie.

SUMMARY OF ARGUMENT

The Ninth Circuit Court of Appeals correctly affirmed the District Court's decision denying admiralty jurisdiction to a shipyard worker who alleged asbestos exposure in the repair of completed vessels, finding the activity of the shipyard worker did not bear sufficient relationship to traditional maritime activity as required by the standard enunciated in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972). There is no true conflict among the Circuits in application of the *Executive Jet* test. The majority of circuits have carefully examined a number of factors and resolved that admiralty jurisdiction does not lie in tort claims of shipyard workers alleging asbestos exposure. The issues involved in Petitioner's claim do not require the special expertise of the admiralty court and are appropriate for state court resolution.

ARGUMENT

1. THE DECISION BELOW NOT TO EXTEND ADMIRALTY JURISDICTION WAS PROPER AND DOES NOT WARRANT FURTHER REVIEW

Petitioner improperly asserts as a ground for Supreme Court review of this case that the decision of the Court of Appeals was in error. Pet. 22. This assertion does not constitute a basis upon which the Supreme Court may grant certiorari under Rule 17, Rules of the Supreme Court. Nevertheless, it is submitted that the Court of Appeals fully considered the jurisdictional issue and correctly applied controlling authority in affirming the District Court's dismissal of the action for want of subject matter jurisdiction.

In *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed. 2d 454 (1972), the Supreme Court enunciated a two-part standard for determining whether a tort claim is within the admiralty jurisdiction of the federal courts. The Supreme Court rejected

the "locality of the wrong" rule as the sole test for determining admiralty jurisdiction, requiring in addition that "the wrong bear a significant relationship to traditional maritime activity." *Id.* at 268. Although the holding in *Executive Jet* was limited to aviation tort claims, the test of *Executive Jet* has subsequently been interpreted as controlling in determining whether to invoke federal admiralty jurisdiction in other tort claims as well. *Foremost Ins. Co. v. Richardson,* 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed. 2d 300 (1982).

In ruling that admiralty jurisdiction does not lie in the instant case, the District Court below applied the two-part standard of *Executive Jet* and determined that petitioner's tort claim did not bear a significant relationship to traditional maritime activity. App. 21.

Petitioner Francois alleged that admiralty jurisdiction is proper because "at the relevant times herein mentioned he worked in the repair of completed vessels involved in the service of water-based commerce and that his handling of and/or exposure to asbestos products referred to herein arose during such activity." App. 3.

The District Court found that "it was irrelevant that the alleged tort occurred aboard ship; no facts have been alleged that demonstrate why there is a significant connection to a traditional maritime activity." App. 21.

In refusing to extend admiralty jurisdiction, the District Court applied the *Executive Jet* test and turned to factors enunciated by the Ninth Circuit Court of Appeals in *Owens-Illinois, Inc. v. United States Dist. Court,* 698 F.2d 967 (9th Cir. 1983). In *Owens-Illinois,* the Ninth Circuit held that admiralty jurisdiction is not conferred in a personal injury action brought by a former shipyard worker alleging injurious exposure to asbestos while installing and cleaning around the installation of asbestos during the construction of new vessels. In determining whether the tort

claim bore significant relationship to maritime activity the Court considered the following four factors: "(1) traditional concepts of the role of admiralty law; (2) the function and role of the parties; (3) the types of vehicles and instrumentalities involved; and (4) the causation and nature of the injuries suffered." *Id.* at 970. Thus, the *Owens-Illinois* Court examined the totality of plaintiff's claim and determined that the nature of plaintiff's job, the tools he used, and the type injury he sustained bore little maritime connection and did not require the expertise of the admiralty Court. *Id.* at 970-971.

The District Court also relied upon the First Circuit opinion in *Austin v. Unarco Industries, Inc.*, 705 F.2d 1 (1st Cir. 1983, cert. dismissed, ... U.S. ....., 104 S.Ct. 34, 77 L.Ed. 2d 1454 (1983), which examined various factors, such as the type work, skills, equipment, and dangers confronting plaintiff's decedent in declining to extend admiralty jurisdiction to any shipyard worker. In *Austin*, plaintiff's decedent was exposed to asbestos while engaged as a painter and cleaner in the construction of new vessels *and* the repair of completed vessels. *Id.* at 3.

In affirmance that petitioner's shipboard painting bears no significant relationship to traditional maritime activity, the Court of Appeals below concluded that its decision in *Myhran v. Johns-Manville Corp.*, 741 F.2d 1119 (9th Cir. 1984) was dispositive and identical to Petitioner's case in all significant respects. The facts in *Myhran* are strikingly similar to the instant case in that the plaintiff in *Myhran* alleged injurious exposure to asbestos while engaged in repair and renovation of completed vessels. Again, the existence of admiralty jurisdiction turned on the determination of whether the workman's activity had significant relationship to traditional maritime activity.

The *Myhran* Court considered the same four factor nexus analysis employed in its earlier decision in *Owens-Illinois*

in correctly deciding that the activities of a pipefitter engaged in ship repair did not bear a significant relationship to traditional maritime activity under *Executive Jet.*

First, the *Myhran* Court looked to the history and purpose of admiralty law as discussed in *Executive Jet.* The Court noted that the lawsuit of a shipyard worker for asbestos-related injuries is not a traditional concern of admiralty law, because resolution of such a case would not require the special expertise of the admiralty court. Moreover, there is no federal interest in uniformity of decision requiring application of federal substantive law. *Id.* at 1122.

Second, under the *Myhran* analysis, the function and role of Petitioner are not those of a seaman. The skills and training of a shipyard painter are those of a landsman not of a sailor. *Id.* at 1122.

Third, the involvement of ships is, at most, tangential to the nature of Petitioner's claims. These claims would be exactly the same if Petitioner's asbestos exposure occurred on land; the tools and equipment used in his work do not possess maritime attributes. *Id.* at 1122.

Finally, the *Myhran* Court concluded that both the alleged asbestos-related injury and its cause are more closely affiliated with land-based negligence. Petitioner states in error that the instrumentalities which caused his injury are maritime products by virtue of their presence aboard ships. Mere transference of an injury-causing instrumentality to a location on board ship, however, does not transfer the causation and nature of the injury into the realm of admiralty. *Id.* at 1122-1123.

The factual findings below are supported by substantial evidence; the allegations of Petitioner's complaint were

merely that he was exposed to "asbestos products" during "repair of completed vessels involved in the service of water-based commerce" App. 3. Under any discussion of the *Executive Jet* test, petitioner's bald allegations fail to meet the locality and nexus requirements. Thus, the decision of the Court of Appeals is supported by solid analysis and does not warrant further review by this Court.

2. NO CONFLICT EXISTS AMONG THE COURTS OF APPEALS JUSTIFYING REVIEW BY THIS COURT

Petitioner concedes that *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio* 409 U.S. 249, 92 S.Ct. 493, 34 L.Ed. 2d 454 (1972) defines the standard for determining the existence of admiralty jurisdiction. Pet. 6. Each circuit which has addressed the issue of whether admiralty jurisdiction lies in tort claims of shipyard workers exposed to asbestos has looked to the two-part test of *Executive Jet,* as controlling precedent.

Petitioner relies heavily on the Fourth Circuit case of *White v. Johns-Manville Corp.* 662 F.2d 234 (4th Cir. 1981) cert. denied, 454 U.S. 1163, 102 S.Ct. 1037, 71 L.Ed 2d 319 (1982) (*White II*) to support his contention of irreconcilable conflict among the Circuits. Respondent submits that the case is distinguishable on its facts and that no true conflict exists.

White II was the first, and is the only, Court of Appeals decision to extend admiralty jurisdiction to a shipyard worker alleging asbestos exposure. In deciding that admiralty jurisdiction extended to the tort claims of shipyard workers exposed to asbestos, the *White II* court only briefly analyzed the function of the shipyard workers and the nature and causation of the injury alleged. It did not closely scrutinize the conduct and function of the workmen in relation to traditional maritime activity, but rather focused

on the material (asbestos) used by the workers, concluding it was an integral part of the vessel thereby justifying the application of admiralty jurisdiction. *Id.* at 240. Thus, the *White II* court did not find a peculiar federal interest or that the workers' functions were unique to maritime activity, but rather stressed the maritime purpose of asbestos.

Petitioner asserts that he comes within the purview of the *White II* decision because "his complaint alleges the maritime nature of the asbestos products he was exposed to." Pet. App. 12. However, his complaint actually does no such thing; petitioner's allegations are only that he handled "asbestos products as referred to herein." App. 3. He later specifically describes these products as "a certain substance, the generic name of which is asbestos, and other products containing said substance." App. 5. Therefore, petitioner's assertion that his case falls within the ambit of admiralty jurisdiction under *White II* is patently false.

It should be noted, that by invoking admiralty jurisdiction, the *White II* court concluded that the equitable doctrine of laches applied, thereby providing plaintiff White a forum which he otherwise would have been denied. The Virginia statute of limitations would have barred plaintiff White's claim in either state court or in federal court under diversity jurisdiction. *Id.* at 240.

No other circuit has been persuaded by the *White II* court's analysis and interpretation of *Executive Jet* or by its anomalous result.

Petitioner's reliance on the decision of the Fifth Circuit in *Lowe v. Ingalls Shipbuilding, A Division of Litton,* 723 F.2d 1173 (5th Cir. 1984) as indicative of inter-circuit conflict is also misplaced. The *Lowe* court denied the shipyard worker's asbestos tort claim in admiralty on the basis of insufficient allegations, expressly declining to decide the

issue of whether there is a distinction between ship construction and ship repair for purposes of applying the *Executive Jet* test. *Id.* at 1190. Consequently, Petitioner's contention that the Fifth Circuit's ruling "might conceivably" extend admiralty jurisdiction to tort claims of shipyard workers exposed to asbestos in the repair of ships is, for the purpose of pointing out a conflict, without merit and lacks foundation.

Since the *White II* decision, the First, Second, Ninth and Eleventh Circuits have held that federal admiralty jurisdiction does not lie in tort claims of shipyard workers exposed to asbestos. Each of the circuits has approached the issue in essentially similar fashion and has consistently refused to extend admiralty jurisdiction to tort actions where damages are sought as a result of exposure to asbestos in construction and/or repair of vessels. Each circuit has uniformly followed the two-part locality/nexus test pronounced by the Supreme Court in *Executive Jet.*

Contrary to Petitioner's assertion, a fair reading of the decisions of the circuits suggests a common and uniform approach for determining the existence of admiralty jurisdiction in the context of asbestos-tort claims.

In undertaking this inquiry, as required by *Executive Jet,* the majority of circuits has focused attention on the function and duties of the workmen as well as the nature and causation of the injury. Each of the circuits has properly concluded that the functions and duties of shipyard workers, resulting in exposure to asbestos, is not activity closely connected to traditional maritime service performed by seamen or members of a ship's crew. In fact, it is activity identical to that performed by scores of landbased workers.

Since the decision of the Fourth Circuit in *White II,* all other circuits which have addressed the issue presented

here have reached the identical result; admiralty jurisdiction does not lie in tort claims brought by shipyard workers alleging asbestos exposure. In reaching this result, the circuits have looked to, and have borrowed from, each other's reasoning and analysis in applying the two-part test of *Executive Jet*, declining to follow the reasoning and result of *White II*. The slight variation in the analyses of the other circuits in applying the same test and reaching the same result does not constitute conflict.

Clearly, a definite trend is apparent; a common and uniform approach has in fact emerged. The majority of circuits, guided by the test of *Executive Jet*, have resolved this issue in a consistent manner, and thus no true conflict remains for this Court's review.

3. EXPANSION OF ADMIRALTY JURISDICTION TO TORT CLAIMS OF SHIPYARD WORKERS ALLEGING ASBESTOS EXPOSURE IS NOT APPROPRIATE

The Supreme Court has indicated an increasing reluctance to widen the scope of admiralty jurisdiction. See *Victory Carriers, Inv. v. Law*, 404 U.S. 202, 212, 92 S.Ct. 418, 30 L.Ed. 2d 383 (1971).

The issues presented by the Petitioner's claim "are identical to those presented in countless other asbestos suits; they involve questions of tort law traditionally committed to local resolution." *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775, 786 (11th Cir. 1984).

Solid reasons support the denial of admiralty jurisdiction in this case which is only incidentally connected to navigable waters and bears no relationship to traditional maritime activity. The state court can plainly exercise jurisdiction over Petitioner's suit and can apply familiar concepts of state tort law without regard to maritime matters. As

was noted in *Austin v. Unarco Industries, Inc.*, 705 F.2d 1, 14 (1st Cir. 1983),

> "The demands of federalism are well served by declining to intrude unnecessarily into an area in which the state has an interest and over which state law is capable of exercising control."

Petitioner's proper forum is the state court; the federal courts would otherwise be clogged with lawsuits the resolutions of which do not require the expertise of the admiralty court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: March 22, 1985

(Appendix follows)

Appendix

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NO. C 83 2737

FIRST AMENDED COMPLAINT FOR DAMAGES
(Negligence, Strict Liability, Enterprise Liability,
False Representation [Restatement § 402-B],
Punitive Damages)

CLARENCE FRANCOIS,
Plaintiff,

vs.

RAYBESTOS-MANHATTAN, INC.; OWENS-ILLINOIS CORPORATION; OWENS-CORNING FIBERGLAS CORPORATION; THE CELOTOX CORPORATION; ARMSTRONG CORK COMPANY; NICOLET INDUSTRIES, INC.; H.K. PORTER COMPANY, INC. A C & S, INC.; AMERICAN ASBESTOS TEXTILE CORPORATION; ESBESTONE CORPORATION; ATLAS ASBESTOS COMPANY; BALDWIN-EHRET HILL, INC.; CLAREMONT COMPANY, INC.; COMBUSTION ENGI-

NEERING, INC.; CROWN COURT AND SEAL; EAGLE PICHER INDUSTRIES; EMPIRE-ACE INSULATION MANUFACTURING CORPORATION; FIBREBOARD CORPORATION; THE FLINTKOTE COMPANY; FORTY-EIGHT INSULATIONS INC.; GAF CORPORATION; GARLOCK, INC.; HURON CEMENT DIVISION OF NATIONAL GYPSUM CORPORATION; J. P. STEVENS, & CO., INC.; KAISER CEMENT CORPORATION; KEASBY AND MATTISON COMPANY; KEENE BILLING PRODUCTS CORPORATION; KEENE CORPORATION; MUNDET CORK, INC.; NATIONAL GYPSUM CORPORATION; PABCO, INC.; PHILIP CAREY MANUFACTURING COMPANY; PITTSBURG CORNING CORPORATION; PITTSBURG PLATE GLASS INDUSTRIES, INC.; RUBEROID COMPANY; SEPCO CORPORATION; SMITH ASBESTOS PRODUCTS, INC.; SOUTHERN ASBESTOS COMPANY; STANDARD ASBESTOS MANUFACTURING AND INSULATING COMPANY; PLANT INSULATION COMPANY; UNITED STATES GYPSUM COMPANY; ATLAS TURNER, INC.; THORPE INSULATION COMPANY; ROCK WOOL MANUFACTURING COMPANY, INC.; RYDER INDUSTRIES; GARLOCK PACKING COMPANY; BLACKHAWK GASKET COMPANY; SACOMO MANUFACTURING COMPANY; SACOMO SIERRA, INC.; UNION CARBIDE CORPORATION; JOHN CRANE; NIATIC RUBBER COMPANY; EAST BAY GASKET, INC.; FLEXITALLIC GASKET COMPANY, INC.; COLT INDUSTRIES, INC.; DEVCON CORPORATION; THE MANVILLE CORPORATION; AMERICAN ASBESTOS PRODUCTS COMPANY; DELAWARE ASBESTOS AND RUBBER; EASTERN REFACTORIES; D. I. DUPONT de Nemours; GENERAL VENEER MANUFACTURING COMPANY; GEORGIA PACIFIC CORPORATION; GRANT WILSON CORPORATION; KAISER STEEL CORPORATION; KAISER ALUMINUM AND CHEMICAL COR-

PORATION; ASARCO, INCORPORATED; LEAR SIEGLER, INC.; NORTH AMERICAN ASBESTOS CORPORATION; GEORGE SHORT COMPANY; GASKET SPECIALTIES, INC.; TURNER-NEWALL INDUSTRIES, INC.; SYNKPLOID COMPANY; WESTERN MAC ARTHUR COMPANY; NORTON COMPANY; REMINGTON INDUSTRIES; WESTERN ASBESTOS COMPANY; BABCOCK & WILCOX,

Defendants.

FIRST CAUSE OF ACTION—NEGLIGENCE
(Personal Injuries)

PLAINTIFF COMPLAINS OF DEFENDANTS, AND EACH OF THEM, AND FOR A CAUSE OF ACTION FOR NEGLIGENCE (PERSONAL INJURIES) ALLEGES:

1. This is a case of admiralty and maritime jurisdiction as hereinafter more fully appears, and is an admiralty or maritime claim within the meaning of Rule 9(h).

2. At all relevant times herein mentioned, plaintiff was a worker who for a substantial length of time used, handled or was otherwise exposed to the asbestos products referred to in paragraph 5, in a manner that was reasonably foreseeable. Plaintiff alleges, further that at the relevant times herein mentioned, he worked in the repair of completed vessels involved in service in water-based commerce and that his handling of and/or exposure to asbestos products referred to herein arose during such activity.

3. Plaintiff is informed and believes, and thereon alleges, that at all times herein mentioned, defendants RAYBESTOS-MANHATTAN, INC.; OWENS-ILLINOIS CORPORATION; OWENS-CORNING FIBERGLASS CORPORATION; THE CELOTEX CORPORATION; ARMSTRONG CORK COMPANY; NICOLET INDUSTRIES, INC.; H. K. PORTER COMPANY, INC.; A C & S, INC.;

AMERICAN ASBESTOS TEXTILE CORPORATION; ESBESTONE CORPORATION; ATLAS ASBESTOS CORPORATION; BALDWIN-EHRET HILL, INC.; CLAREMONT COMPANY, INC.; COMBUSTION ENGINEERING, INC.; CROWN COURT AND SEAL; EAGLE PICHER INDUSTRIES; EMPIRE-ACE INSULATION MANUFACTURING CORPORATION; FIBREBOARD CORPORATION; THE FLINTKOTE COMPANY; FORTY-EIGHT INSULATIONS, INC.; GAF CORPORATION; GARLOCK, INC.; HURON CEMENT DIVISION OF NATIONAL GYPSUM CORPORATION; J. P. STEVENS & CO., INC.; KAISER CEMENT CORPORATION; KEASBY AND MATTISON COMPANY; KEENE VILDING PRODUCTS CORPORATION; KEENE CORPORATION; MUNDET CORK, INC.; NATIONAL GYPSUM CORPORATION; PABCO, INC.; PHILIP CAREY MANUFACTURING COMPANY; PITTSBURG CORNING CORPORATION; PITTSBURG PLATE GLASS, INDUSTRIES, INC.; RUBEROID COMPANY; SEPCO CORPORATION; SMITH ASBESTOS PRODUCTS, INC.; SOUTHERN ASBESTOS COMPANY; STANDARD ASBESTOS MANUFACTURING AND INSULATION COMPANY; PLANT INSULATION COMPANY; UNITED STATES GYPSUM COMPANY; ATLAS TURNER, INC.; THORPE INSULATION COMPANY; ROCK WOOL MANUFACTURING COMPANY, INC.; RYDER INDUSTRIES; GARLOCK PACKING COMPANY; BLACKHAWK GASKET COMPANY; SACOMO MANUFACTURING COMPANY; SACOMO SIERRA, INC.; UNION CARBIDE CORPORATION; JOHN CRANE; NIATIC RUBBER COMPANY; EAST BAY GASKET, INC.; FLEXITALLIC GASKET COMPANY, INC.; COLT INDUSTRIES, INC.; DEVCON CORPORATION; THE MANVILLE CORPORATION; AMERICAN ASBESTOS PRODUCTS COMPANY; DELAWARE ASBESTOS AND RUBBER; EASTERN REFACTORIES; D. I. DUPONT de Nemours; GENERAL VENEER MAN-

UFACTURING COMPANY; GEORGIA PACIFIC CORPORATION; GRANT WILSON CORPORATION; KAISER STEEL CORPORATION; KAISER ALUMINUM AND CHEMICAL CORPORATION; ASARCO, INCORPORATED; LEAR SIEGLER, INC.; NORTH AMERICAN ASBESTOS CORPORATION; GEORGE SHORT COMPANY; GASKET SPECIALTIES, INC.; TURNER-NEWALL INDUSTRIES, INC.; SYNKPLOID COMPANY; WESTERN MAC ARTHUR COMPANY; NORTON COMPANY; REMINGTON INDUSTRIES; WESTERN ASBESTOS COMPANY; BABCOCK & WILCOX are corporations organized and existing under and by virtue of the laws of the State of California, or the laws of some other state or foreign jurisdiction, and that said defendants were and are authorized to do and are doing business in the State of California, and that said defendants have regularly conducted business in the City and County of San Francisco, State of California.

4. At all times herein mentioned, each of the defendants, was the agent, servant, employee and/or joint venturer of his co-defendants, and each of them, and at all said times, each defendant was acting in the full course and scope of said agency, service, employment and/or joint venture.

5. At all times herein mentioned, defendants, and each of them, were and are engaged in the business of manufacturing, fabricating, designing, assemblying, distributing, leasing, buying, selling, inspecting, servicing, repairing, marketing, warranting and advertising a certain substance, the generic name of which is asbestos, and other products containing said substance.

6. At all times herein mentioned, defendants, and each of them, singularly and jointly, negligently and carelessly researched, tested or failed to test, warned or failed to warn, manufactured, designed, developed, distributed, labeled, advertised, marketed, warranted, inspected, re-

paired, fabricated, modified, serviced, and sold a certain substance, the generic name of which is asbestos, and other products containing said substance, in that said substance was capable of causing and did, in fact, proximately case personal injuries to users, consumers, workers and others, while being used in a manner reasonably foreseeable, thereby rendering said substance unsafe and dangerous for use by the consumers, users, bystanders or workers exposed thereto.

7. As a direct and proximate result of the conduct of the defendants, and each of them, as aforesaid, the exposure to asbestos caused severe and permanent injury to the plaintiff, including, but not limited to, asbestosis, other lung damage, and cancer.

8. Plaintiff is informed and believes, and thereon alleges, that asbestosis is a progressive lung disease caused by inhalation of asbestos fibers without perceptible trauma and that said disease results from exposure to asbestos and asbestos products over a period of time.

9. Plaintiff presently believes that he suffers from a condition known as asbestosis or other diseases including cancer related to the exposure to asbestos. Plaintiff was not aware that exposure to asbestos presented any risk of injury and/or disease to him, and had not been advised or informed by anyone that he could contact, or indeed did contact any disease, sickness or injury as a result of working in the vicinity of asbestos.

10. As a direct and proximate result of the aforementioned conduct of defendants, and each of them, plaintiff is dying and has suffered, and continues to suffer permanent injuries to his person, body and health, including but not limited to asbestosis, other lung damage, and cancer, all to his general damage in the sum of $1,000,000.00.

11. As a direct and proximate result of the aforesaid conduct of the defendants, and each of them, plaintiff has incurred, is presently incurring and will incur in the future, liability for physicians, surgeons, nurses, hospital care, medicine, hospices, x-rays and other medical treatment, the true and exact amount thereof being unknown to plaintiff at this time, and plaintiff prays leave to amend this Complaint accordingly when the true and exact cost thereof is ascertained.

12. As a further direct and proximate result of the said conduct of defendants, and each of them, plaintiff has incurred, and will incur, loss of income, wages, profits and commissions, a diminishment of earning potential, and other pecuniary losses, the full nature and extent of which are not yet known to plaintiff; and leave is requested to amend this Complaint to conform to proof at the time of trial.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as hereinafter set forth.

SECOND CAUSE OF ACTION—STRICT LIABILITY

AS AND FOR A SECOND, SEPARATE, FURTHER AND DISTINCT CAUSE OF ACTION FOR STRICT LIABILITY, PLAINTIFF COMPLAINS OF DEFENDANTS, AND EACH OF THEM, AND ALLEGES AS FOLLOWS:

13. Plaintiff incorporates herein by reference, as though fully set forth herein, paragraphs 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12 and 13 of the FIRST CAUSE OF ACTION herein.

14. Defendants and each of them researched, manufactured, tested or failed to test, warned or failed to warn, designed, labeled, distributed, advertised, marketed, warranted, inspected, repaired, offered for sale and sold a certain substance, the generic name of which is asbestos and other products containing said substance, which substance is defective, in that same was capable of causing and

did, in fact, cause personal injuries, including asbestosis, other lung damage and cancer, to the users and consumers thereof while being used in a reasonably foreseeable manner, thereby rendering the same unsafe and dangerous for use by consumers, users, bystanders and workers exposed thereto; said defendants, and each of them, further failed to adequately warn of the risks to which plaintiff and others similarly situated were exposed.

15. As a direct and proximate result thereof, plaintiff has suffered the injuries and damages previously alleged.

THIRD CAUSE OF ACTION— ENTERPRISE LIABILITY

AS AND FOR A THIRD, SEPARATE, FURTHER AND DISTINCT CAUSE OF ACTION FOR ENTERPRISE LIABILITY, PLAINTIFF COMPLAINS OF DEFENDANTS, AND EACH OF THEM, AND ALLEGES AS FOLLOWS:

16. Plaintiff incorporates by reference as though fully set forth herein each of the paragraphs of the First and Second Causes of Action herein.

17. In the event plaintiff is unable to identify the specific defendant which supplied the asbestos or asbestos related products which caused the damages referred to above, plaintiff alleges that as between an innocent plaintiff and negligent defendants, the latter should bear the cost of injury. Plaintiff has joined in this action the manufacturers of a substantial share of the asbestos which caused the injuries complained of herein. It is alleged that liability attaches to all of the named defendants, and such liability shall be for their percentage of fault as per the rules set forth in the decision of *Sindell v. Abbott Laboratories, et al.*

18. As for a direct and proximate result thereof, plaintiff has suffered the injuries and damages previously alleged.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as hereinafter set forth.

FOURTH CAUSE OF ACTION—FALSE REPRESENTATION UNDER RESTATEMENT OF TORTS Sec. 402-B

AS AND FOR A FURTHER, FOURTH, SEPARATE AND DISTINCT CAUSE OF ACTION FOR FALSE REPRESENTATION UNDER RESTATEMENT OF TORTS SECTION 402-B, PLAINTIFF COMPLAINS OF DEFENDANTS, AND EACH OF THEM, AND ALLEGES AS FOLLOWS:

19. Plaintiff incorporates by reference the entire Second Cause of Action of this Complaint.

20. At the aforementioned time when defendants, and each of them, researched, manufactured, tested or failed to test, warned or failed to warn, designed, labeled, distributed, advertised, marketed, warranted, inspected, repaired, offered for sale and sold the said asbestos and asbestos-containing products, as hereinabove set forth, the defendants, and each of them, expressly and impliedly represented to members of the general public, including the purchasers and users of said product, and including the plaintiff herein and his employers, that asbestos and asbestos-containing products were of merchantable quality, and safe for the use for which they were intended.

21. The purchasers and users of said asbestos and asbestos-containing products, including the plaintiff and his employers, relied upon said representations of defendants, and each of them, in the selection, purchase and use of asbestos and asbestos-containing products.

22. Said representations by defendants, and each of them, were false and untrue, in that the asbestos and asbestos-containing products were not safe for their intended use, nor were they of merchantable quality as represented by defendants, and each of them, in that asbestos and asbestos containing products have very dangerous properties and defects whereby said products cause asbestosis, other

lung disabilities and cancer, and have other defects that cause injury and damage to the users of said products, including the plaintiff herein, thereby threatening the health and life of plaintiff.

23. As a direct and proximate result of said false representations by defendants and each of them, the plaintiff sustained the injuries and damages hereinabove set forth.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as hereinafter set forth.

FIFTH CAUSE OF ACTION—PUNITIVE DAMAGES

AS AND FOR A FURTHER, FIFTH, SEPARATE AND DISTINCT CAUSE OF ACTION FOR PUNITIVE DAMAGES, PLAINTIFF COMPLAINS OF DEFENDANTS, RAYBESTOS MANHATTAN, INC., OWENS-ILLINOIS CORPORATION, OWENS-CORNING FIBERGLASS CORPORATION, THE CELOTEX CORPORATION, ARMSTRONG CORK COMPANY, NICOLET INDUSTRIES, INC., H. K. PORTER COMPANY, INC., AND EACH OF THEM, AND ALLEGES AS FOLLOWS:

24. Plaintiff incorporates by reference each and every paragraph of the First, Second, Third and Fourth Causes of Action of this Complaint, and makes them a part of this, the Fifth Cause of Action, as though fully set forth herein.

25. In researching, testing, manufacturing, distributing, labeling and marketing asbestos and asbestos products, defendants in this cause of action named, and each of them, did so with conscious disregard for the safety of the users of said asbestos and asbestos products, in that said defendants had specific prior knowledge that there was a high risk of injury or death resulting from exposure to asbestos or asbestos products, including but not limited to lung cancer and other forms of cancer, and asbestosis. Said knowledge was obtained, in part, from scientific studies and medical data to which defendants had access, as well as

scientific studies performed by, at the request of, or with the assistance of, said defendants, and which knowledge was obtained by said defendants on or before 1933, and thereafter.

26. On or before 1933, and thereafter, said defendants were aware that users of asbestos and asbestos products, as well as members of the general public who would be exposed to asbestos and asbestos products, had no knowledge or information indicating that asbestos could cause injury, and said defendants knew that the users of asbestos and asbestos products, as well as members of the general public who were exposed to asbestos and asbestos products, would assume, and in fact did assume, that exposure to asbestos and asbestos products were safe, when in fact said exposure was extremely hazardous to human life.

27. With said knowledge, said defendants opted to manufacture and distribute said asbestos and asbestos products without attempting to protect users from or warn users of, the high risk of injury or death resulting from exposure to asbestos and asbestos products. Rather than attempting to protect users and workers from, or warn workers and users of, the high risk of injury or death resulting from exposure to asbestos and asbestos products, defendants intentionally failed to reveal their knowledge of said risk, and consciously and actively concealed and suppressed said knowledge from members of the general public, thus impliedly representing to members of the general public that asbestos and asbestos products were safe for all reasonably foreseeable use, with the knowledge of the falsity of said implied representations.

28. The above referenced conduct of said defendants was motivated by the financial interest of said defendants in the continuing, uninterrupted distribution and marketing of asbestos and asbestos products. In pursuance of said financial motivation, said defendants consciously disre-

garded the safety of the users of, and persons exposed to, asbestos and asbestos products, and were in fact, consciously willing to permit asbestos and asbestos products to cause injury to workers and users thereof, and persons exposed thereto, including plaintiff.

29. As the above referenced conduct of said defendants was and is wilfull, malicious, outrageous and in conscious disregard and indifference to the safety and health of workers exposed to asbestos and asbestos products, including plaintiff, plaintiff, for the sake of example, and by way of punishing said defendants, seeks punitive damages according to proof.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For plaintiff's general damages in the sum of $1,000,000.00;

2. For plaintiff's loss of income, wages and earning potential according to proof;

3. For plaintiff's medical and related expenses according to proof;

4. For plaintiff's cost of suit herein; and

5. As to those defendants named in the Fifth Cause of Action, for exemplary or punitive damages according to ing to proof;

6. For such other and further relief as to the court may see just and proper.

Dated: July 6, 1983.

CARTWRIGHT, SUCHERMAN,
SLOBODIN & FOWLER, INC.

By: /s/
for HARRY F. WARTNICK

In the United States District Court
For the Northern District of California

No. C-83-2737 RFP

Clarence Francois,
Plaintiff,

v.

Raybestos-Manhattan, Inc., et al.,
Defendants.

Memorandum of Decision

[Filed Dec. 1, 1983]

SUMMARY

The defendants in this asbestos action have filed three motions to dismiss: (1) a motion to dismiss for lack of subject matter jurisdiction; (2) a motion to dismiss for failure to state a claim; and (3) a motion to dismiss for lack of personal jurisdiction. The first two motions (lack of subject matter jurisdiction and failure to state a claim) have been made by various defendants,[1] while the motion to dismiss for lack of personal jurisdiction has been raised by a single defendant.[2]

The plaintiff in this action originally worked at Mare Island Naval Shipyard. While working at Mare Island, he alleges that he was exposed to the asbestos that is causing his current health problems. It is this exposure that gives rise to his cause of action.

[1]The following defendants have joined in the first two motions: Armstrong World Industries, Inc.; U.S. Gypsum Co.; The Flintkote Co.; Fibreboard Corp.; Keene, Corp.; Keene Building Products Corp.; Owens-Corning Fiberglas Corp.; Nicolet, Inc.; Celetex Corp.; PPG Industries; ACands, Inc.; Standard Insulations, Inc.; Eagle-Pitcher Industries, Inc.

[2]The Standard Asbestos Mfg. & Insulating Co.

The court finds that the subject matter jurisdiction issue is dispositive and therefore there is no need to resolve the other two issues.

LACK OF SUBJECT MATTER JURISDICTION

The plaintiff originally filed this action under the admiralty jurisdiction of the court as set out in 28 U.S.C. § 1333.[3] The defendants move to dismiss the entire complaint, contending that this personal injury action does not have a significant relationship to a traditional maritime activity and therefore is not maintainable as an admiralty claim. As admiralty is the only basis for federal jurisdiction alleged by the plaintiff, this action must be dismissed if admiralty jurisdiction does not obtain.

The plaintiff alleges that admiralty jurisdiction is proper because ". . . at the relevant times herein mentioned, he worked in the repair of completed vessels involved in the service of water-based commerce and that his handling of and/or exposure to asbestos products referred to herein arose during such activity." Complaint at 2. Thus, the plaintiff contends that his participation in the repair of maritime vessels brings his claim within the ambit of admiralty jurisdiction.

In analyzing this contention, this court must begin with the controlling Supreme Court directives. Historically, admiralty jurisdiction has been extended to all torts occurring on the high seas or navigable waters. *See, e.g., The Plymouth,* 3 Wall 20, 36 (1866) ("[e]very species of tort,

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[3]The text of 28 U.S.C. § 1333 reads as follows:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.
>
> (2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance.")

In *Executive Jet Aviation, Inc. v. City of Cleveland,* 404 U.S. 249 (1972), the Court articulated a new standard for defining the scope of admiralty jurisdiction and rejected the traditional test based on "locality." The historical locality test would have conferred admiralty jurisdiction on the *Executive Jet* cause of action, which involved an airplane crash into the navigable waters of Lake Erie. But in *Executive Jet* the Supreme Court concluded that this accident did not have a sufficient relationship to traditional maritime activity and that admiralty jurisdiction should not apply. *Executive Jet* supplemented the simple locality test with an additional requirement:

> we conclude that the mere fact that the alleged wrong "occurs" or is located on or over navigable waters . . . is not of itself sufficient . . . . It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity.

Executive Jet Aviation, Inc. v. City of Cleveland, 404 U.S. at 268.

Subsequent to its decision in *Executive Jet,* the Supreme Court has emphasized that this "significant relationship to traditional maritime activity" test applies to all cases where admiralty jurisdiction is sought. In *Foremost Insurance Co. v. Richardson,* ..... U.S. ....., 102 S.Ct. 2654, 2658 (1982), the Court noted that "the *Executive Jet* requirement that the wrong have a significant connection with traditional maritime activity is not limited to the aviation context." The clear implication of *Foremost Insurance* is that *any* party asserting admiralty jurisdiction must be prepared to demonstrate a significant connection with a traditional maritime activity.

In wrestling with this issue of when admiralty jurisdiction obtains, the Ninth Circuit recently addressed a situation very similar to the instant action. *See Owens-Illinois, Inc. v. United States District Court,* 698 F.2d 965 (9th Cir. 1983). In *Owens-Illinois,* the court held that admiralty jurisdiction did not lie in a personal injury action brought by a plaintiff who alleged exposure to asbestos during the *construction* of new maritime vessels. The court stated:

> we conclude that the torts alleged here, arising solely in the process of new ship construction, lack the "maritime flavor" necessary to invoke the jurisdiction of the federal courts under 28 U.S.C. § 1333(1).

Owens-Illinois, 698 F.2d at 970. *See also Hollister v. Luke Construction Co.,* 517 F.2d 920, 921 (5th Cir. 1975) ("it is also true that since a contract for the building of a ship is non-maritime in character, a tort arising out of work on a launched but incomplete vessel also lacks maritime flavor.")

It is important to note that in *Owens-Illinois* the Ninth Circuit did not confront the precise issue presently before this court: does admiralty jurisdiction lie in a personal injury action when the tort allegedly occurred during *repair* of an already completed vessel? Although the question now before this court is a question of first impression in this circuit, the Ninth Circuit has given some suggestion as to how it might ultimately resolve this issue. In reaching its decision in *Owens-Illinois,* the court looked to the overall nature of the claim and stated:

> Nor does an examination of the other factors persuade us of a significant maritime quality to the claims asserted here. Plaintiff's job, installing and cleaning up around the installation of asbestos, is hardly a distinctively maritime role, in contrast to the navigational functions of the crew of a ship engaged in ocean or river shipping. While ships were obviously involved here, the tools and safety equipment (or lack thereof)

> present in the installation and clean-up of asbestos—unlike the navigational equipment and safety devices of a vessel—possess few maritime attributes. The use of masks, unlike the provision of lifeboats, is hardly a precautionary measure distinctively connected to traditional maritime activity. Finally, the nature of the injury, an asbestos-related disease, and its causation, the unprotected inhalation of asbestos fibers, bear little maritime connection. Both the injury and its cause are far more closely affiliated with the clearly land-based negligence arising in the construction industry generally than with negligence taking place in commerce and navigation on the navigable waters.

Id. at 970-71.

This statement suggests the approach that the Ninth Circuit considers to be proper under *Executive Jet*. Although this willingness to look at the totality of the situation was made in the context of an injury alleged during the construction of maritime vessels, it could just as easily apply to the facts alleged by the plaintiff in the instant action involving repair.

Nevertheless, the plaintiff attempts to argue that *Owens-Illinois* established a meaningful distinction between injuries occurring during construction and repair. Conceding that the Ninth Circuit has excluded construction-related injuries from admiralty jurisdiction, the plaintiff goes on to argue that "in maters of contract, admiralty jurisdiction *will lie* when the contract relates to repair or navigation . . . ." Plaintiff's Memorandum of Points and Authorities at 2 (emphasis in original). In support of this argument, the plaintiff can only point to language—best described as dicta—in *Owens-Illinois* that states "Where a contract relates to the repair or navigation of a vessel, a dispute arising from the contract lies within admiralty jurisdiction." 698 F.2d at 970.

The plaintiff's attempt to rely upon this statement falls short and it should not be used to resolve the issue currently before this court. First, the statement relied upon by plaintiff does not—on its face—control the instant situation. That statement refers to disputes arising out of contract. The matter before this court sounds in tort. Second, the statement that plaintiff points to is supported only by cases that pre-date *Executive Jet;* it is not at all clear that it accurately states viable law. Third, and most importantly, the arbitrary distinction that the plaintiff seeks to draw between construction and repair is flatly contradicted by the remainder of the *Owens-Illinois* opinion itself, where the court stressed the need for examining the totality of the plaintiff's situation. 698 F.2d at 970-71. In essence, this argument by the plaintiff seeks to take dicta from the *Owens-Illinois* opinion and use it to turn the logic of the opinion inside out.

The flaw in the plaintiff's argument is made even clearer by examining what the Ninth Circuit chose not to do in *Owens-Illinois.* In reaching its decision, the Ninth Circuit explicitly refused to follow a previous decision of the Fourth Circuit granting admiralty jurisdiction in a ship construction case after finding that the asbestos containing products involved had a maritime purpose. *See White v. Johns-Manville Corp.,* 662 F.2d 234 (4th Cir. 1981). The *White* court held that "when the materials used by these shipyard workers were designed, advertised, and marketed as maritime asbestos products, the *Executive Jet* criteria have been met and admiralty jurisdiction should be exercised." *Id.* at 240.

The *Owens-Illinois* court refused to apply the *White* rationale to the case before it, noting that there was no showing that the asbestos products involved in *Owens-Illinois* had been designed, advertised or marketed as maritime products. But even after noting this factual distinction, the Ninth Circuit noted its discomfort with using

White as a guidepost when it stated that "we have difficulty with the [*White*] court's reasoning." *Owens-Illinois,* 698 F.2d at 971. Significantly, the plaintiff in the instant action has failed to allege that the relevant products were 'designed, advertised, and marketed as maritime asbestos products.' Thus, even if the Ninth Circuit followed *White*—which it does not—the plaintiff's argument would fail.

The intimation contained within *Owens-Illinois* that admiralty jurisdiction is not available when the only maritime connection occurred during the drydock repair of ships is a conclusion already reached by the First Circuit. In a long and carefully reasoned opinion, *Austin v. Unarco Industries, Inc.,* 705 F.2d 1 (1st Cir.), *petition for cert. filed,* 51 U.S.L.W. 2631 (U.S. June 28, 1983, No. 2-2164), the First Circuit concluded that admiralty jurisdiction is not available to a personal injury plaintiff who alleged exposure to asbestos during *either* the construction or repair of maritime vessels. The *Austin* court concurred with the defendants in rejecting the claim of jurisdiction:

> [The defendant] argues, however, that the decedent's work was not significantly related to traditional maritime activity involving navigation and commerce, as required by the Court in *Executive Jet;* that injuries to shipyard workers are not a traditional concern of admiralty law; and that the policy justifications for a uniform maritime law do not support admiralty jurisdiction in this case. After much reflection, we agree.

Id. at 11.

The *Austin* court predicated its decision on what it saw as the underlying purpose of admiralty jurisdiction:

> The law of admiralty has evolved over many centuries, designed and molded to handle problems of vessels relegated to ply the waterways of the world, beyond whose shores they cannot go. That law deals with navigational rules—rules that govern the manner and direc-

> tion those vessels may rightly move upon the waters. . . . It is concerned with maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, and claims for salvage.

Id. (*quoting from Executive Jet,* 409 U.S. at 270.)

In refusing to extend the scope of admiralty jurisdiction, *Austin* established a test that is worthwhile and instructive: the only personal injuries that fall within admiralty jurisdiction are those that occur to seamen and others doing seamen's work. Those performing non-traditional maritime services, even if performed in a shipyard, cannot avail themselves of admiralty jurisdiction. *Austin,* 705 F.2d at 10. In applying this test to asbestos workers who apparently performed tasks very similar to those performed by the plaintiff in the instant action, the *Austin* court concluded:

> Under the tests set out above, the plaintiff's decedent would plainly be excluded. The ships on which he worked were out of navigation and the work was major, requiring special equipment and skills. It was not work traditionally done by members of the crew. More important, if the reason for admiralty's special concern for the care and safety of seamen is that they are exposed to the peculiar hazards of the sea and a vessel's equipment, then the dangers faced by a shipyard worker installing asbestos insulation are scarcely traditional concerns of admiralty or is there any reason to expect an admiralty court to possess expertise in addressing those dangers.

Id. at 12.

The *Austin* court's refusal to extend admiralty jurisdiction in this setting also accords with federalism concerns. The risks encountered by the plaintiff engaged in repair of ships differ little, if at all, from the risks encountered by dry land construction workers installing or repairing

similar asbestos products. These similarly situated dry land workers cannot avail themselves of federal jurisdiction; they must press their claims in state court. It is thus difficult to fashion a rationale for permitting the instant plaintiff to pursue his action in federal court when similarly situated plaintiffs who worked on dry land are barred from this court. As the Supreme Court has expressed increasing reluctance in recent years about widening the scope of admiralty jurisdiction, *see Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212 (1971), this court must be sensitive to going beyond the permissible scope of admiralty.

Thus, the court concludes that the defendants' motion to dismiss for lack of subject matter jurisdiction should be granted. Although the Ninth Circuit has not yet spoken definitively on this issue, the more well reasoned trend of the case law avoids extending admiralty jurisdiction unless there is a significant relationship to traditional maritime activity.

In this case, it was irrelevant that the alleged tort occurred aboard ship; no facts have been alleged that demonstrate why there is a significant connection to a traditional maritime activity. Applying the test laid out by the Supreme Court in *Executive Jet* and the First Circuit in *Austin*, the defendant's motion for dismissal for lack of subject matter jurisdiction will be granted.

Accordingly, there is no need to address either of the remaining two motions.

SO ORDERED.

Dated: November 30, 1983

/s/ ROBERT F. PECKHAM

Chief United States District Judge

In the United States District Court
For the Northern District of California

No. C-83-2737 RFP

Clarence Francois,
Plaintiff,

v.

Raybestos-Manhattan, Inc., et al.,
Defendants.

JUDGMENT

[Filed Dec. 1, 1983]

The defendants in this action have moved to dismiss the plaintiff's cause of action on three separate grounds. Upon consideration of the memoranda filed in support of and in opposition to these motions, and upon consideration of the oral arguments made by cousel, the court rules as follows.

The defendants have moved to dismiss the plaintiff's claim on the grounds that there is no admiralty jurisdiction in this case. For the reasons outlined in the memorandum of decision that accompanies this judgment, the court concludes that there is no admiralty jurisdiction in this case and that the entire action must be dismissed. Thus, there is no reason for the court to reach the remaining two jurisdictional issues raised by the defendants.

Accordingly, the defendants' motion to dismiss for lack of subject matter jurisdiction is granted. Let judgment be entered accordingly.

SO ORDERED.

Dated: December 1, 1983

/s/ ROBERT F. PECKHAM
Chief United States District Judge

United States Court of Appeals
For The Ninth Circuit

No. 83-2660
D.C. No. CV-83-2737-RFP

Clarence Francois,
Plaintiff-Appellant,

vs.

Raybestos-Manhattan, Inc.; Owens-Illinois Corp.; Owens-Corning Fiberglas Corp.; The Celotox Corp.; Armstrong Cork Company; Nicolet Industries, Inc.; H. K. Porter Co., Inc., et al.,
Defendants-Appellees.

[Filed Nov. 13, 1984]

Argued and Submitted October 3, 1984

Appeal from the United States District Court
for the Northern District of California
Hon. Robert F. Peckham, District Judge, Presiding

MEMORANDUM*

Before: BROWNING, ANDERSON, and REINHARDT, Circuit Judges.

The district court dismissed Francois' claim for lack of subject matter jurisdiction, finding the tort action not sufficiently related to traditional maritime activity to justify the exercise of federal admiralty jurisdiction. We affirm.

*The panel has concluded that the issues presented by the appeal do not meet the standards set by Rule 21 of the Rules of this court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the *Federal Reporter*, and that this memorandum may not be cited to or by the courts of this circuit.

In *Owens-Illinois, Inc. v. United States District Court*, 698 F.2d 967 (9th Cir. 1983) (per curiam), we indicated that four factors must be considered in order to determine whether an alleged tort bears a significant relationship to traditional maritime activity: "(1) traditional concepts of the role of admiralty law; (2) the function and role of the parties; (3) the types of vehicles and instrumentalities involved; and (4) the causation and nature of the injury suffered." *Id.* at 970.

After carefully considering these factors, this court has recently concluded that an employee's tort action, arising from exposure to asbestos-related products during the repair of ships, does not bear a significant relationship to traditional maritime activity and thus is not cognizable as an admiralty claim. *Myhran v. Johns-Manville Corp.*, Nos. 82-3660, 82-3661 (9th Cir. Aug. 27, 1984). While the plaintiff in *Myhran* was a pipefitter and Francois is a painter, their tort claims are identical in all significant respects. Accordingly, *Myhran* is dispositive here.

AFFIRMED.